Breeden Painting Co., Inc. *and* International Brotherhood of Painters and Allied Trades, Local 318. Cases 16–CA–16525 and 16–CA–16618

August 24, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

Upon charges filed by the Union on February 11 and March 22, 1994, the General Counsel of the National Labor Relations Board issued a consolidated complaint on June 13, 1994, against Breeden Painting Co., Inc. (the Respondent) alleging that it has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Although properly served copies of the charges and consolidated complaint, the Respondent failed to file an answer.

On July 11, 1994, the General Counsel filed a Motion for Summary Judgment with the Board. On July 14, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated June 30, 1994, notified the Respondent that unless an answer was received by July 5, 1994, a Motion for Summary Judgment would be filed. The Respondent filed no answer.[1]

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Oklahoma corporation, with an office and place of business in Midwest City, Oklahoma, has been engaged in the building and construction industry and has been providing painting services as a subcontractor on the Ballpark in Arlington, the facility involved in these proceedings, located in Arlington, Texas. During the year preceding issuance of the complaint, the Respondent purchased and received goods and materials valued in excess of $50,000, which goods and materials originated from points and places outside the State of Texas and were shipped directly to its Arlington jobsite. We find that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All Painters, Decorators, Paperhangers, and their apprentices employed by the Employer at its Arlington, Texas jobsite.
>
> Excluded: All other employees, including guards and supervisors as defined in the Act.

On about October 7, 1992, Tomco Industries, Inc., which is not a party to this proceeding, and the Union entered into a collective-bargaining agreement (the Area Agreement) effective from October 7, 1992, through May 21, 1994, and year-to-year thereafter until terminated. On about April 22, 1993, the Respondent entered into a memorandum of understanding with the Union which at all times material bound the Respondent to the terms and conditions of the Area Agreement.

Respondent, an employer engaged in the building and construction industry, as described above, granted recognition to the Union as the exclusive collective-bargaining representative of the unit without regard to whether the majority status of the Union had ever been

[1] Following issuance of the original complaint in Case 16–CA–16525, which alleged that the Respondent had violated Sec. 8(a)(5) by failing to provide necessary and relevant information to the Union regarding employees working on the Respondent's job at the Ballpark in Arlington, the Respondent's vice president sent a letter to the Region dated April 20, 1994, stating that the Respondent ''denies the complaint in Case 16–CA–16525.'' The letter asserted that a company representative had met with the Union in January 1994 to try and resolve any misunderstanding with the Union but the parties were unable to come to an agreement or solution. The letter further asserted that the Union had failed to meet its obligations to supply qualified workers the Respondent needed to complete its job. We find that the Respondent's letter does not constitute a sufficient answer under Sec. 102.20 because it fails to meet the substance of the complaint allegations. See *Parisian Manicure Mfg. Co.*, 258 NLRB 203 (1981); *United Super*, 256 NLRB 1186 (1981); and *Lloyd's Laundry & Dry Cleaning*, 250 NLRB 1369 (1980). Cf. *M. J. McNally, Inc.*, 302 NLRB 120 (1991) (Respondent's pro se answer specifically denied paragraph of complaint containing operative facts of the alleged unfair labor practice).

established under the provisions of Section 9(a) of the Act. Such recognition has been embodied in the memorandum of understanding described above. For the period April 22, 1993, until termination of the memorandum of understanding, based on Section 9(a) of the Act, the Respondent has been the limited exclusive bargaining representative of the unit.[2]

On about March 11, 1994, Respondent terminated Rafael Quinteros and Julian Beltran. Respondent engaged in such conduct because its employees formed, joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

On about January 25 and 31 and February 7, 1994, the Union by telephone, certified letter, and facsimile, respectively, requested that the Respondent furnish it with the names, wages, and positions of all employees who worked on the job at the Ballpark in Arlington. The information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the limited exclusive collective-bargaining representative of the employees in the unit. Since on about January 25, 1994, the Respondent has failed and refused, and continues to fail and refuse, to furnish the Union with the information described above.

Since on or about September 22, 1993, the Respondent has failed to make all required contributions to the Union's pension fund, vacation trust fund, and the joint apprenticeship and training fund. Since on or about the same date, the Respondent has failed to pay its employees overtime in accordance with the terms of the memorandum of agreement, failed to pay its employees the wage rate required under the terms of the memorandum of agreement, and failed to abide by the terms of the grievance procedure set forth in the memorandum of agreement. The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent regarding this conduct and the effects of this conduct.

CONCLUSION OF LAW

By terminating employees Rafael Quinteros and Julian Beltran, the Respondent has discriminated in regard to hire, or tenure, or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

By failing and refusing to provide information requested by the Union on about January 25 and 31 and February 7, 1994, to make all required contributions to the Union's pension, vacation trust, and the joint apprenticeship and training funds, and to pay its employees overtime and the wage rate as set forth in the memorandum of agreement and abide by the terms of the grievance procedure set forth in the memorandum of agreement, the Respondent has failed and refused to bargain in good faith with the Union as the limited exclusive representative of the unit employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by discharging Rafael Quinteros and Julian Beltran, we shall order the Respondent to offer the discriminatees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful discharges and to notify the discriminatees in writing.

Further, having found that the Respondent has violated Section 8(a)(5) and (1) since about September 22, 1993, by failing to make contractually required contributions to the Union's pension fund, vacation trust fund, and the joint apprenticeship and training fund, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d. 940 (9th CIr. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F2d. 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

[2] In the absence of any need to determine in this proceeding whether the parties' relationship is governed by Sec. 9 or by Sec. 8(f), Member Browning would not reach that issue.

Further, having found that the Respondent violated Section 8(a)(5) and (1) since about September 22, 1993, by failing to pay unit employees contractual wages rates and overtime, we shall order the Respondent to make the unit employees whole for any losses attributable to its reduction in wages and overtime as set forth in *Ogle Protection Service*, supra, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.

Finally, having found that the Respondent has also violated Section 8(a)(5) and (1) by failing to provide the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees, we shall order the Respondent to furnish the Union the information requested.

ORDER

The National Labor Relations Board orders that the Respondent, Breeden Painting Co., Inc., Midwest City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because of union or other protected concerted activities

(b) Failing and refusing to bargain with the International Brotherhood of Painters and Allied Trades, Local 318, as the limited exclusive collective-bargaining representative of the employees in the unit described below, by failing and refusing to provide information requested by the Union that is necessary for, and relevant to, its performance of its function as the limited exclusive representative of the unit employees, failing and refusing to make contributions to the Union's pension fund, vacation trust fund, and the joint apprenticeship and training fund, as required by the memorandum of agreement, and failing and refusing to pay its employees overtime and wage rates and to comply with the grievance procedure as set forth in the memorandum of agreement:

> Included: All Painters, Decorators, Paperhangers, and their apprentices employed by the Employer at its Arlington, Texas jobsite.
>
> Excluded: All other employees, including guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Rafael Quinteros and Julian Beltran immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharge will not be used against them in any way.

(c) Make all required contributions to the Union's pension fund, vacation trust fund, and the joint apprentice and training fund retroactive to September 22, 1993, in the manner set forth in the remedy section of this decision.

(d) Process any grievances that it failed to process in accordance with the terms of the memorandum of agreement retroactive to September 22, 1993.

(e) Honor the terms of the memorandum of agreement with the Union, and make whole the unit employees for any loss of earnings, benefits, or expenses resulting from its failure to make contributions to the Union's pension fund, vacation trust fund, and the joint apprenticeship and training fund, and to pay overtime and wage rates as required by the memorandum of agreement, as set forth in the remedy section of this decision.

(f) Furnish the Union the information it requested on about January 25 and 31 and February 7, 1994.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Post at its facility in Arlington, Texas, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against employees because they joined or assisted the Union or because they engaged in other protected concerted activities for the purposes of collective bargaining or mutual aid or protection.

WE WILL NOT refuse to bargain with International Brotherhood of Painters and Allied Trades, Local 318 as the limited exclusive collective-bargaining representative of the employees in the unit described below by failing to provide relevant and necessary information to the Union, failing to make contributions to the Union's pension fund, vacation trust fund, and the joint apprenticeship and training fund, and failing to pay employees overtime and wage rates and process grievances in accordance with our memorandum of agreement with the Union:

> Included: All Painters, Decorators, Paperhangers, and their apprentices employed by us at our Arlington, Texas jobsite
>
> Excluded: All other employees, including guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer employees Rafael Quinteros and Julian Beltran full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of their unlawful terminations, with interest.

WE WILL notify Rafael Quinteros and Julian Beltran, in writing, that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

WE WILL make all required contributions to the Union's pension fund, vacation trust fund, and the joint apprentice and training fund retroactive to September 22, 1993.

WE WILL process any grievances that we failed to process in accordance with the terms of the memorandum of agreement retroactive to September 22, 1993.

WE WILL honor all the terms of our memorandum of agreement with the Union and WE WILL make whole the unit employees for any loss of earnings, benefits, or expenses they may have incurred as result of our failure and refusal to make contributions to the pension, vacation trust, and the joint apprenticeship and training fund and to pay overtime and wage rates as required by the memorandum of agreement, with interest.

BREEDEN PAINTING CO., INC.